No. 11760

# In the United States
# COURT OF APPEALS
## for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY, a corporation,

*Appellant,*

vs.

FRANCES M. STEINBACH, also known as FRANCIS M. STEINBACH, and CAROLYN S. STEINBACH,

*Appellees.*

## PETITION FOR REHEARING AND BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.



MacCormac Snow,
602 Pacific Building,
Portland 4, Oregon,
*Attorney for Appellant.*

STEVENS-NESS LAW PUB. CO., PORTLAND 11-48

## TOPICAL INDEX



## LIST OF AUTHORITIES

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*Appellees.*

## PETITION FOR REHEARING

Upon Appeal from the District Court of the United States for the District of Oregon.

Comes the Appellant and respectfully petitions the above entitled court for a rehearing of the above entitled case upon the grounds hereinafter in this petition set forth.

1. This court has held that Captain Corgan held the legal title to the dredge and that the Steinbach ladies held a beneficial interest therein. Such a theory was not alleged in the pleadings and did not become an issue

at the trial below or in this court. Appellees never argued this theory in the court below or in this court, nor is it touched upon in any of the briefs. None of the authorities cited by this court in support of this theory were cited in any of the briefs. Appellant has never had an opportunity or occasion to argue or brief this theory and desires to do so.

2. This court is quite inconsistent in its discussion of such concepts as "legal title", "ownership", "beneficial interest", and the like. For example, in the first complete paragraph on page 3 of the opinion, the court commences by saying that Captain Corgan held the legal title and ends by saying that the Appellees held the legal title. By the aid of this confusion the court has held for the purpose of getting an interest into the Appellees through the family conference, that the Appellees were the beneficial owners of the dredge, and for the purpose of making truthful the representation made by Mr. Steinbach to the insurance agent that the Appellees owned the dredge, that they were the legal owners.

3. This court has incorrectly set forth the Oregon Statute which, contrary to the paraphrase thereof in the opinion, provides that an equitable interest is an insurable interest only if the person holding the same stands to gain or lose by the safe arrival or loss of the property insured. There is no evidence that either of the Appellees lost anything when the dredge was lost or would have gained if it had not been lost. The uncontradicted evidence is to the contrary.

4. The court has utterly disregarded the testimony in saying that the defective hawser was a part of the equipment of the "tug".

The Appellant attaches hereto its brief in support of this Petition and requests the court to examine this brief in considering this Petition.

Respectfully submitted,

MacCormac Snow,
Attorney for Appellant.

I, MacCormac Snow, do hereby certify that I am counsel for the Appellant above named and that in my judgment the foregoing Petition for Rehearing and the brief submitted in support of the same are well founded and that the said petition is not interposed for delay.

MacCormac Snow.

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## APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

### In Support of Its Petition for Rehearing

We will take up the four points set out in the petition for rehearing in the order in which they are there stated.

### This Court's Theory New and Untested

1. Taking up the opinion by its four corners, we think the Court intended to hold that Captain Corgan took the legal title to the dredge under a trust, with the

beneficial interest in the Steinbach men, and that the men in the family conference transferred this beneficial interest to the ladies.

This view of the case is entirely outside the issues heretofore made. The Complaint alleges and the Answer denies that the ladies were the owners of the dredge. There is no allegation of any trust or of any separation of legal and equitable rights. The case was tried on the theory that the ladies claimed to be the legal owners, although when all the evidence was in it showed without dispute that they never acquired the legal title. However, the Trial Court wanted the Steinbach men to have the proceeds of the insurance policy, so he held at first the women were the "proper parties" to insure the dredge. Your Honors considered this a conclusion of law and sent the case back for supplementary findings. The Trial Court then held without benefit of evidence that the ladies were the legal owners of the dredge. Your Honors must have been dissatisfied with the trial Court's second effort because you held that Captain Corgan held the legal title in trust for the ladies.

There has been no occasion up to this time for either party to brief either in the Trial Court or in this Court any question of beneficial or equitable ownership and neither party did so. Your Honors have sprung a brand new theory and have condemned the Appellant under this theory without giving the Appellant a chance to make any defense.

If the Appellees had pleaded that they were the beneficial or equitable owners of the dredge, the answer

would have been different and the issues would have been different on the trial. The Appellant would have placed greater emphasis on the fact that the policy purports to insure legal ownership not beneficial interest. Appellant would also have pleaded and relied more strongly on the misrepresentation by which John L. Steinbach represented that the ladies owned the legal interest and said nothing about a beneficial interest. Additional evidence would have strengthened the record on this point in favor of the Appellant. On the legal side of the issues, Appellant would have briefed thoroughly the English cases and the American cases which hold that ordinarily legal and not beneficial interests are the subject of insurance and that where beneficial interests are insured they must be especially declared and described to the underwriter. On this latter point Appellant has already cited one case that of *Ohl v. Eagle Insurance Co.* (CCD Mass.) 18 F. Cas. # 10473, an opinion by Mr. Justice Story of the Supreme Court of the United States an excerpt of which we insert at this point.

*Ohl v. Eagle Ins. Co.* (CCD Mass.) 18 F. Cas. # 10473, reiterating 18 F. Cas. # 10472.

The insured vessel's written record showed ownership by Ohl and Remington. The vessel was lost. Ohl attempted to recover the full amount of the policy but was permitted to recover only one-half. Ohl claimed a beneficial interest in Remington's legal title to one-half, but Mr. Justice Story said concerning equitable interests:

"Whatever may be the general rule on this subject, in ordinary cases, I am of opinion, that an insurance on a ship is to be deemed, unless a special explanation is given, to be an insurance on the legal interest, and not on a mere equitable interest, as contradistinguished from the legal interest of the ship; and at all events not an insurance upon a mere private, verbal trust, in opposition to the ship's papers and the overt acts of the parties. If such an interest is to be insured, it ought to be disclosed. The nature of such a title must ordinarily be material to the risk: and if by possibility it be not so, still it cannot be fairly presumed to be within the intention of the underwriter upon the common terms of a policy on a ship. In the absence of all explanation I think those terms must be understood to apply to a legal interest, and not to a mere parol trust or equity. I confess myself also to be strongly of opinion, that there is, in every case of this nature, an implied representation, that the ship's papers are according to the real legal ownership. No one has a right to say, that the true character of the ship and the representation of the genuine interest of the parties to the insurance are not, or may not be, material to the underwriter in estimating his risk. No one has a right to suppose, that in case of loss the underwriter is to be responsible, not according to the legal import of the ship's papers, but to verbal engagements and parol trusts, which are susceptible of being shaped according to events. In what manner could the underwriters in this very case, assert an exclusive ownership upon an abandonment against Remington? The effect of the acts of the master, being a part owner, might be very important in the consideration, not only of questions of peril and revenue, but of the general conduct of the voyage. If the underwriter is not put upon any inquiries of this nature by any disclosure of a special interest or special ownership, he has a right to suppose, that the parties deal with him upon the naked avowal of legal titles."

Even with the present record we think that, if given a fair chance, we can demonstrate to this Court that the ladies never received a beneficial interest in the dredge or that even if they did they did not insure such an interest.

We submit that when an Appellate Court invents a new theory for the decision of a case, a theory that has not been argued by counsel or presented in the pleadings, that theory should, in all fairness be subjected to the criticism of counsel on both sides.

Another question we should like to argue,—a true beneficial interest is, under the law of trusts, always valuable. A legal title may be naked,—that is, without value inhering in the possessor thereof. The same cannot be said of a beneficial interest. The ladies put no value into the dredge nor did they receive any value from the men. John L. Steinbach said (Appellant's Main Brief, 20):

> "I was interested in just the insurance being enough to cover, to protect us for the amount that we had paid for it. I though we should insure it for not over $10,000 and probably $8,000. We were kind of short of money."

When he said this, Mr. Steinbach was talking about himself and his brother, not about the two ladies. There is no doubt that the women are not the real parties in interest in this case. Any recovery they make they will turn over to the men except to the extent that Captain Corgan may get a part.

Again we would like to cite authorities and make an

argument based on the Oregon Statute (O.C.L.A. 101-1119) which provides in part as follows:

> "Every contract of marine insurance by way of gaining (gaming) or wagering is void.
>
> "A contract of marine insurance is deemed to be a gaming or wagering contract . . . . (b) where the policy is made 'interest or no interest', or 'without further proof of interest than the policy itself', or *'without benefit of salvage to the insurer',* or subject to any other like term; provided, that where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer." (Emphasis ours)

This is not an insurance where there is no possibility of salvage. In fact, a suit is now pending against Otto Berg and his son, owners of the fishboat Julia D. for the negligent loss of the dredge.

But what chance does the insurance company to have to realize on this salvage in view of the fact that the legal title to the dredge is now held to have been in Captain Corgan and the women lost nothing when the dredge was lost. What salvage is possible where a beneficial interest is insured? The insured cannot in such a case give title to the property if there is any salvage left in it nor can the assured give the company a good cause of action against a wrongdoer causing the loss of the property. If the insurance company had voluntarily taken upon itself the protection of a beneficial interest that would have been another matter, but Mr. Steinbach testified that he told the insurance agent that the ladies owned the dredge and this testimony was repeated by Mr. Knapp, the insurance agent, and stands undenied.

We touched on these matters of salvage under the contention made by the Appellees when this case first went before your Honors that the ladies owned the dredge because they owned it in common with their husbands. But when subject of salvage is looked at from the point of view that the ladies had a beneficial interest in the dredge, that subject takes on a new aspect.

We think the Court before committing itself to the beneficial interest theory should hear argument on this point and permit it to be briefed.

## The Court's Trust Ideas Are All Confusion

2. The Court cites two trust cases in order to demonstrate that the Appellees were the beneficiaries of a trust in the dredge, the legal title to which was in Captain Corgan. Neither of these cases was cited by either party in any brief. Neither remotely suggests any similarity with the facts at bar. But both opinions are well considered upon their own facts.

In the case of *Allen v. Hendricks,* 104 Ore. 202, a father was the owner of two certificates of deposit. He indorsed them in blank and sent them to his son with a letter written and signed by him. He thereafter died. The case turned on the meaning of the letter. The father's executor claimed that it created a bailment in the son and that the estate was the owner. The Court held, however, that the effect of the letter was to place the legal title to the certificates in the son, in trust nevertheless for the father during his lifetime, with a

remainder over to the son, and that this remainder, upon the death of the father, ripened into ownership.

The opinion was written by Honorable Lawrence T. Harris, one of Oregon's most distinguished jurists. Judge Harris thought proper to go into some of the fundamental concepts of the law of trusts. He said (223):

> "A trust implies two estates,—one legal, and the other equitable; it also implies that the legal title is held by one person, the trustee, while another person, the *cestui que trust,* has the beneficial interest. (223)"

The Court also cites Professor Austin W. Scott's great work on Trusts. Mr. Scott says what Mr. Justice Harris does, in language only slightly different (1 Scott 36):

> "A trust is created only where the title to property is held by one person for the benefit of another."

It is interesting and surprising to us that the Court, in passing on the present case, should have found and cited an opinion by Mr. Justice Harris. The Judge is both a plain man and a learned lawyer; he uses words in their well understood meanings, and with precision. He says at page 211:

> "The owner of personal property can, when dealing with it, create a trust. . . ."

In using the word "owner", Judge Harris obviously did *not* mean to describe the beneficiary of a trust already created, in which the legal title was in some trustee. He used the word in the sense that Americans use

it millions upon millions of times each day. When we say that Smith owns a horse or that the Steinbach ladies own a dredge the hearer understands that ordinary legal ownership is meant, not that Smith or the Steinbach ladies have a beneficial interest only in the horse or the dredge, and that the legal title is in some one else.

The word "owners" is used in its ordinary sense in the policy of insurance at bar (Tr. 64), and also in the complaint where it is alleged (denied by the answer) that appellees were the owners of the dredge (Tr. 2). Likewise the Trial Court used the word "ownership" in its commonly accepted meaning in his Supplemental Findings, wherein he says that the ownership of the dredge by the Appellees was complete.

The Court cites the Restatement of the Law of Trusts, another work of the very highest merit. The Restatement says of the term "Owner" that it signifies the holding of a title for one's own benefit alone. We quote (1 Restatement 9 # 2d):

> "*Title and Ownership.* The term 'owner' is used in the Restatement of this Subject to indicate a person in whom one or more interests are vested for his own benefit. The person in whom the interests are vested has 'title' to the interests whether he holds them for his own benefit or for the benefit of another. Thus the term 'title', unlike 'ownership', is a colorless word; to say without more that a person has title to certain property does not indicate whether he holds such property for his own benefit or as trustee.
>
> "Ownership may be predicated of a thing as well as of interests in the thing. A person is termed 'owner of a thing' if he has complete property in

the thing; and even if he has parted with some of his interests he may still be termed owner of the thing, for example, where he has granted an easement or made a lease. The phrase 'title to a thing' denotes an aggregate of interests in the thing of such an extent that if the person who has the title is not under a duty to deal with the interests for the benefit of another person, he is owner of the thing.

*"Illustration:*

"2. A, the owner of Blackacre, grants an easement over Blackacre to B and makes a lease of Blackacre for ten years to C. A transfers Blackacre subject to the easement and lease to D and his heirs upon an active trust for E. B has title to and owns an easement in Blackacre but has not title to and does not own Blackacre. C has title to and owns a leasehold estate in Blackacre but has not title to and does not own Blackacre. D has title to but does not own Blackacre. E has title to and owns an equitable interest in Blackacre but does not have title to and does not own Blackacre."

We wonder if this Court realizes how terribly it has misused such words as "title", "ownership", "owner" "beneficial interests", and their counterparts, and what havoc this misuse has played with the sense of the opinion. The opinion falls into three parts.

1. Your Honors hold that Captain Corgan took a transfer of the dredge from the War Department and did not execute any instrument transferring it to the Appellees or anyone else, and that Captain Corgan was the "holder of the legal title" (p. 3, line 9). We have no fault to find with this. It is clearly in accordance with the testimony.

2. Your Honors go on to say that at the family conference it was understood between the four Steinbachs that the "ladies should own the dredge" (p. 2, line 29); that the Steinbach men "later obtained an interest (p. 2, line 36); that this was "sufficient recognition to pass the beneficial interest to the wives" (p. 3, line 4).

This, we think, is loose thought, out of step with the evidence. The Court will remember the testimony about the family conference. Frances Steinbach said, "We were all to own it together" (Appellant's Brief on Supplemental Findings of Fact, 25). Carolyn Steinbach testified that she had no financial interest in the dredge, and no ownership except "just through my husband" Appellant's Brief on Supplemental Findings of Fact, 30). David Steinbach and John L. Steinbach testified substantially in the language of the former, "Well, we agreed to put it in the ladies' names" (Appellant's Main Brief, 22).

In this testimony there is *no suggestion whatever about separating the legal title from the beneficial interest.* All of the testimony was about ownership. The idea of a trust with the legal title in Captain Corgan and the beneficial interest in the ladies is the invention of the Court.

3. However, the gravest error of the opinion is that having satisfied yourselves that the women got a beneficial interest in the dredge, your Honors then, without reason, precedent, authority or testimony undertook to turn that beneficial interest into a legal title. We ask the court to reexamine its most amazing paragraph,—

the first complete paragraph on page three of the opinion. *This paragraph starts by treating Captain Corgan as holder of the legal title and ends saying that the legal title lies with the Appellees.*

Where could anybody find authority for the proposition that because a trustee who holds the legal title does not register objection to the supposed transfer of a beneficial interest from one beneficiary to another, the transferee beneficiary thereby becomes vested with the legal title and combines in himself full ownership,—that is, the beneficial interest merged with the legal title. Your Honors never found anything like this in Scott or the Restatement, or in the cases cited in the opinion.

The Court having transferred the beneficial interest from the men to the women without aid of testimony, and having then converted the women's beneficial interest to a full ownership by pure legerdemain, says that John L. Steinbach misrepresented nothing when he told the agent of the insurance company that the women owned the dredge and had bought it with their own money (Appellant's Main Brief, 17). "This must have been so," says the Court (p. 4, line 2) because the women held,—(of all things) *"the beneficial interest"*.

Thus, at the end of the opinion, the Court overlooks the ladies' "legal title" and claims for them only a beneficial interest. Mr. Steinbach did not represent to the insurance agent that the women had only a beneficial interest in the dredge, he represented that they owned it. He so testified (Appellant's Main Brief, 18).

It should not be overlooked that the ladies paid no money or gave no value for the dredge, received no written transfer, took no delivery of the dredge, and never had possession or control of the same.

What does the Court mean by the terms "beneficial interests", "title", "legal title", "owned", and "ownership"? Certainly the Court does not mean the same thing for any of these terms each time the Court uses it.

We think this Court owes to itself the duty of rewriting this opinion so that the words in it mean the same thing every time they are used, so that the legal reasoning shall be well knit, and so that the entire opinion may conform to the testimony.

## This Court Misstates the Oregon Statute and Ignores the Other Authorities

3. This is an insurance case involving insurable interest, yet this Court cites in its opinion no insurance case and, by the same token, no case involving insurable interest. The reason is not that there are no cases to cite. The briefs cite many of them, some directly in point,—all contrary to the opinion.

The only insurance law cited by the Court is the Oregon Statute (p. 3, line 21-23). If a lawyer in a brief were to misstate the purport of a Statute as the Court has in its opinion, it would be a sure sign that his case was weak, and that he knew it, and hoped the Court would not read the entire Statute. This Statute is correctly quoted on page 73 of Appellant's main brief. As

far as concerns this case, it is to the effect that a person has an insurable interest if he stands in a legal or equitable relation to insured property *in consequence of which* he may benefit by its safety or due arrival or be prejudiced by its loss.

The Court holds that the Appellees were beneficiaries of a trust in the dredge and therefore had an equitable interest in the dredge and therefore had an insurable interest therein. But in so doing the Court overlooks the equally important second half of the Statute. Let the Court point out how the Appellees would have gained by the safe arrival of the dredge or how they lost by the loss thereof. The Appellees did not have one dollar in the dredge. They would have gained nothing if the towage had been made safely and they lost nothing by the loss of the dredge.

Carolyn Steinbach testified that she had no financial interest in the dredge. Frances Steinbach loaned money on an unsecured note and will be repaid regardless of the loss of the dredge (Appellant's Main Brief, 13).

## No Tug Was Involved—Hawser Is Not Fishboat Equipment

4. As regards the defective hawser, the Court has quite disregarded the evidence. The towage was not attempted by a tug but by a fishboat. The equipment of the fishboat did not include any hawser, (Tr. 150, 154) (why should it?) therefore Captain Corgan said he would borrow one. He and his son, without permis-

sion (Appellant's Main Brief, 59), got the hawser out of the loft of the Coast Guard boathouse and payed it out of the window to the deck of the fishboat below. It broke five times. Of course the fishboat and its owners were negligent in using the hawser. But the hawser was no part of their equipment. A fishboat does not need a hawser, it uses other equipment in its ordinary business.

We submit that the Court has not correctly rationalized the case and should require additional argument.

Respectfully submitted,

MacCormac Snow,
Attorney for Appellant.